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22 UNITED STATES DISTRICT COURT
23 NORTHERN DISTRICT OF CALIFORNIA

24 A WHITE AND YELLOW CAB, INC.,
25 Plaintiff,
26 vs.
27 UBER TECHNOLOGIES, INC. et al.,
28 Defendants.

Case No. 4:15-05163-JSW

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF UBER
DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED COMPLAINT**

Date: August 11, 2017

Time: 9:00 a.m.

Ctrm: 9

Judge: Hon. Jeffrey S. White

Trial Date: N/A

SUMMARY OF ARGUMENT

2 On March 31, 2017, the Court granted in part Uber's Motion to Dismiss, permitting
3 Plaintiff to file an amended complaint *if* it could allege facts (1) the adjudication of which
4 "would not hinder ongoing CPUC supervision and regulation;" (2) that would show it is
5 entitled to restitution, and (3) regarding Uber's prices, the costs of their product, or their
6 costs of doing business. Order [Dkt. No. 64] pp. 11, 18-19. Plaintiff's First Amended
7 Complaint ("FAC") fails to remedy any of these deficiencies specifically identified by the
8 Court relating to its Unfair Competition Law ("UCL") and Unfair Practices Act ("UPA")
9 claims. The Court should not hesitate to dismiss them again, this time with prejudice.

10 The gravamen of Plaintiff's UCL and UPA claims is that Uber operates "de facto
11 taxis" in violation of local taxi regulations. As this Court and all other courts to examine
12 this issue have found, the California Public Utilities Commission ("CPUC") has exercised
13 its jurisdiction to regulate Uber as a transportation network company ("TNC"), finding that
14 Uber does not provide taxi services. Because Uber is under the jurisdiction of the CPUC,
15 Plaintiff's claims impermissibly invade the exclusive jurisdiction of the CPUC. Cal. Pub.
16 Util. Code § 1759; *San Diego Gas and Elec. Co. v. Super. Ct.*, 13 Cal. 4th 893, 918 (1996).
17 Plaintiff has not even attempted to plead new facts avoiding that exclusive jurisdiction bar.
18 The Court should dismiss Plaintiff's First and Second Claims for Relief under the UCL and
19 UPA without leave to amend because it lacks jurisdiction over those claims.

20 Plaintiff's UCL cause of action also fails to state a remedy as a matter of law.
21 Plaintiff no longer seeks injunctive relief, and still fails to allege facts showing a claim for
22 restitution under the UCL. Plaintiff's claim under the UPA fails as a matter of law because
23 Plaintiff continues to allege that Uber sold products or services below *Plaintiff's* costs, not
24 *Uber's* costs as the law requires. Plaintiff's additional anecdotal allegations regarding
25 Uber's costs do not begin to meet the strict pleading requirements under the UPA.

26 Plaintiff has demonstrated it has no ability to amend its complaint to state a viable
27 claim. As such, the Court should dismiss the UCL and UPA claims without leave to
28 amend.

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1 I. INTRODUCTION

2 On March 31, 2017, the Court issued an Order granting in part Uber's Motion to
 3 Dismiss finding that: (1) Plaintiff's UCL and UPA claims were based on Uber's alleged
 4 operation of a "de facto taxicab" service and thus fall within the exclusive jurisdiction of
 5 the CPUC, (2) Plaintiff's UCL and False Advertising Law claims also failed because
 6 Plaintiff failed to allege its own reliance to establish standing, and impermissibly sought
 7 non-restitutionary disgorgement, and (3) Plaintiff failed to allege any facts to support a
 8 UPA claim. Though Plaintiff has added a number of superfluous allegations against
 9 Defendants Uber Technologies, Inc., Rasier, LLC, and Rasier-CA, LLC (collectively,
 10 "Uber") in its First Amended Complaint ("FAC"), the gravamen of Plaintiff's failed
 11 Complaint remains.

12 Plaintiff has disregarded the Court's clear instruction to allege only facts "that
 13 would not hinder ongoing CPUC supervision and regulation." Instead, Plaintiff's UCL and
 14 UPA claims continue to be based on Uber's alleged operation of "de facto taxicabs" in
 15 violation of regulations governing taxis. Plaintiff alleges that Uber did not charge taxi
 16 fares, did not comply with regulations for "authentic taxicabs," did not carry insurance
 17 required for "authentic taxicab companies," and violated other laws which govern
 18 "authentic taxicab companies." As the Court stated in its prior Order dismissing Plaintiff's
 19 claims, "if the Court were to find for Plaintiff and conclude that Uber should be subject to
 20 requirements applicable to regular taxis, that finding would 'hinder or interfere with a
 21 broad and continuing CPUC program.' " March 31, 2017 Order [Dkt. No. 64], 11:1-3,
 22 quoting *Rosen v. Uber Technologies, Inc.*, 164 F. Supp. 3d 1165, 1175 (N.D. Cal. 2016)
 23 ("*Rosen II*"). Accordingly, Plaintiff's UCL and UPA claims must be dismissed because
 24 Cal. Pub. Util. Code § 1759 precludes courts from adjudicating any claims that might
 25 "hinder or interfere" with the CPUC's jurisdiction. *San Diego Gas and Electric
 Company v. Superior Court*, 13 Cal. 4th 893, 918 (1996).

27 Plaintiff also continues to assert claims against the CPUC, alleging the CPUC acted
 28 unconstitutionally and violated Plaintiff's civil rights by regulating Uber and other app-

1 based ride request services. These assertions only underscore that the relief Plaintiff is
 2 seeking interferes with the CPUC's asserted jurisdiction. What's more, the CPUC's
 3 presence as a defendant here raises another defense: Cal. Pub. Util. Code § 1756(a)
 4 requires any challenge to a CPUC decision to be made by writ to the California Court of
 5 Appeal or Supreme Court. Plaintiff never made such a claim. Put simply, Plaintiff's "de
 6 facto taxi" claims are also barred under Section 1756(a) as an improper collateral attack in
 7 the wrong court on the CPUC's decisions.

8 Finally, even if the CPUC did not have exclusive jurisdiction over Plaintiff's "de
 9 facto taxi" claims, its claims still fail as a matter of law. The FAC continues to fail to state
 10 a claim under the UCL and UPA. Plaintiff's allegations show that it impermissibly seeks
 11 damages, which are unavailable under the UCL. Further, Plaintiff's new allegations to its
 12 UPA claims also do not save it from dismissal because Plaintiff continues to fail to allege
 13 that Uber sold its products below its own costs, rather than Plaintiff's costs, as the law
 14 requires, and because Plaintiff's anecdotal allegations regarding Uber's costs do not begin
 15 to meet the strict pleading requirements under the UPA.

16 Accordingly, Uber requests that the Court dismiss Plaintiff's first and second causes
 17 of action under the UCL and UPA, without leave to amend, and allow Plaintiff to proceed
 18 only on its Lanham Act false advertising claim, which Uber does not here challenge.

19 **II. BACKGROUND**

20 Plaintiff filed its original complaint in this case on November 10, 2015, alleging
 21 four causes of action against Uber for violation of the UCL, Cal. Bus. & Prof. Code
 22 §§ 17200 *et seq.*, the UPA, Cal Bus. & Prof. Code §§ 17000 *et seq.*, the Lanham Act, 15
 23 U.S.C. § 1125(a), and the False Advertising Law ("FAL"), Cal. Bus. & Prof. Code
 24 §§ 17500 *et seq.* Plaintiff also sued the CPUC and five of its commissioners alleging that
 25 the CPUC acted unconstitutionally and violated its civil rights by asserting jurisdiction
 26 over and regulating TNCs. Uber promptly moved to dismiss Plaintiff's UCL, UPA, and
 27 FAL claims, arguing that the Court lacked jurisdiction and that Plaintiff could not allege
 28 facts sufficient to support those claims.

1 **A. The Court's March 31, 2017 Order**

2 On March 31, 2017, this Court issued an Order Granting in Part and Denying in
 3 Part Uber's Motion to Dismiss ("Order"). [Dkt. No. 64, p. 1.] The Court dismissed
 4 Plaintiff's claims for four reasons: (1) the Court lacked jurisdiction because resolution of
 5 Plaintiff's claims would "hinder ongoing CPUC supervision and regulation" in violation of
 6 Cal. Pub. Util. Code § 1759 (*Id.* at 11); (2) Plaintiff failed to allege reliance to support its
 7 claims under the FAL and the UCL's fraudulent prong (*Id.* at 15); (3) Plaintiff failed to
 8 allege restitution under the FAL or UCL (*Id.* at 16); and (4) Plaintiff failed to allege facts
 9 to support a claim based on locality discrimination, or regarding Uber's prices, the cost of
 10 its product, or the cost of doing business, and so could not state a claim under the UPA (*Id.*
 11 at 19). In addition, the Court found that Plaintiff lacked standing to seek injunctive relief
 12 under either the UCL or UPA because Plaintiff went out of business in April 2016. *Id.* at
 13 7-8. The Court permitted Plaintiff to amend its complaint only *if* it could state claims
 14 whose resolution would not require interference with the CPUC's jurisdiction, *if* it could
 15 allege entitlement to restitution, and *if* it could allege facts regarding Uber's pricing and
 16 costs. Plaintiff has failed in every respect.

17 **B. The Allegations in Plaintiff's First Amended Complaint**

18 Despite the Court's clear message to Plaintiff that it needed to *change* its allegations
 19 if it wished to state any viable claims against Uber, Plaintiff's FAC primarily adds more
 20 *detail* to its defective claims under the UCL and UPA. The few new allegations Plaintiff
 21 adds do nothing to remedy the fatal defects identified by the Court.

22 1. **CPUC Jurisdiction**

23 Like the original complaint, the gravamen of the FAC is *still* Uber's alleged
 24 operation of a "*de facto* taxicab fleet in direct competition" to Plaintiff without complying
 25 with local taxi regulations. FAC ¶ 3. Indeed, Plaintiff continues to allege Uber unfairly
 26 competes by failing to comply with specific taxi regulations. *See, e.g.*, FAC ¶ 68 ("Uber
 27 continues to operate in Orange County and other parts of the State as a *de facto* taxi
 28 company, without compliance with any of the taxicab regulations and ordinances,

1 including those established by the City of Anaheim and the County of Orange at the John
 2 Wayne Airport, setting its own prices rather than complying with the taxi pricing required
 3 by OCTAP....").

4 Plaintiff also continues to acknowledge the CPUC's jurisdiction over Uber. FAC
 5 ¶ 2 ("Beginning in about 2013 the CPUC, acting under color of law, allowed UBER to
 6 operate '*de facto*' taxis ... without requiring UBER to comply with ordinary taxicab
 7 regulations," by enacting CPUC Decision 13-09-045). Further, Plaintiff effectively
 8 concedes that the CPUC's jurisdiction is dispositive by suing the CPUC, in this very
 9 lawsuit, to try to nullify its authority to regulate Uber and other TNCs. FAC ¶ 4 (Plaintiff
 10 seeks a declaration that "the CPUC's creation and implementation of CPUC Regulation 13-
 11 09-045" was unconstitutional).

12 In short, Plaintiff has made no serious attempt to plead facts in the FAC avoiding
 13 the CPUC's exclusive jurisdiction.

14 2. UCL Allegations - Restitution

15 Plaintiff's FAC substitutes the word "restitution" for "disgorgement." Plaintiff's
 16 substitution, however, does nothing to change the substance of its original allegation that it
 17 had "a vested property right" in "market share." *See, e.g.*, FAC ¶ 52. To the contrary, it
 18 retains its defective allegation that "every fare that an UBER *de facto* taxi picked up ...
 19 was a fare that UBER took directly from A TAXI's drivers...." *Id.* ¶ 59. *See also* ¶ 56
 20 (Uber "began stealing A TAXI's fares, all to A TAXI's damage...."); ¶ 62 (Plaintiff was
 21 "deprived of its vested earnings" because Uber took "that money from passengers who
 22 would have taken a ride in an authentic A TAXI taxicab"); ¶ 63 (Uber took fares "that A
 23 TAXI would have received instead of UBER, but for UBER's acts of unfair competition.").

24 The only substantive difference between the original complaint and the FAC is
 25 Plaintiff's suggestion that it lost money in the form of diminished *leases* in addition to lost
 26 fares. Specifically, Plaintiff alleges that some of its drivers chose not to renew their leases,
 27 apparently preferring to drive for Uber, and that Plaintiff's lease revenue declined as a
 28 result. *Id.* ¶ 57. *See also* FAC ¶ 53 (Plaintiff's "gross income in relevant part came from

1 leasing its taxicabs to taxicab drivers...."). Plaintiff now contends that it "lost its vested
 2 rights to the money that it had previously received from the lease payments of drivers who
 3 picked up taxicab fares at one of the venues that had an exclusivity agreement with
 4 [Plaintiff]." *Id.* ¶ 59.

5 3. UPA Allegations

6 Plaintiff still fails to allege any facts regarding locality discrimination, or regarding
 7 the cost of Uber's product or of doing business, as ordered by the Court. Order at 18-19.
 8 Although the FAC invokes Cal. Bus. & Prof. Code § 17040, it contains no allegations
 9 regarding locality discrimination. *See* FAC ¶ 67. And while Plaintiff does allege some
 10 facts regarding Uber's pricing (FAC ¶ 67), the only concrete assertion it makes regarding
 11 Uber's costs is that they were lower than Plaintiff's, and in some cases non-existent. FAC
 12 ¶¶ 67, 69 (Uber "has kept [its] vehicles expenses ... non-existent or negligible" and pays
 13 "no regular employment benefits" to drivers). Further, Plaintiff concedes that it simply
 14 does not know anything about Uber's actual costs, because Uber has kept those costs "a
 15 well-guarded secret." *Id.* ¶ 69.

16 Plaintiff supplements these useless allegations with the vague and conclusory
 17 assertion that Uber "has many other very large expenses," since it employs thousands of
 18 people and must pay for, e.g., office space and advertising. *Id.* ¶ 69. It also offers
 19 allegations designed to inflame rather than illuminate, based on various media reports, that
 20 Uber "spends a far greater amount of money ... than the average or typical business entity,
 21 in order to find a way to avoid the payment of taxes, to operate so as to saturate, dominate,
 22 and then take over the taxicab market, and to develop its product in a way that avoids
 23 compliance with the law...." *Id.* Insofar as any factual allegation can be distilled from this
 24 sentence, it appears to be that Uber makes investments to *minimize* its costs.

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1 **III. LEGAL ANALYSIS**2 **A. Plaintiff's *De Facto* Taxi Claims Ask The Court To Interfere With The**
3 **CPUC's Asserted Jurisdiction**

4 This Court determined that Plaintiff's claims in the FAC were barred by Cal. Pub.
5 Util. Code § 1759(a), because "if the Court were to find for Plaintiff and conclude that
6 Uber should be subject to the requirements applicable to regular taxis, that finding would
7 'hinder or interfere with a broad and continuing CPUC program.' " Order at 11, citing
8 *Rosen II*, 164 F. Supp. 3d at 1175. The Court granted Plaintiff leave to amend only if it
9 could allege facts that "would not hinder ongoing CPUC supervision and regulation." *Id.*

10 Plaintiff has failed entirely to address this Order. Plaintiff has included no new
11 facts of any substance suggesting how its "de facto taxi" allegations avoid CPUC
12 jurisdiction. Rather, Plaintiff continues to rely on the same allegations. *See, e.g.* FAC ¶ 58
13 (Uber "operate[s] de facto taxicabs ... in direct competition to all of the authentic Orange
14 County-based taxi companies"); ¶ 68 ("Uber continues to operate in Orange County and
15 other parts of the State as a *de facto* taxi company, without compliance with any of the
16 taxicab regulations and ordinances, including those established by the City of Anaheim
17 and the County of Orange at the John Wayne Airport, setting its own prices rather than
18 complying with the taxi pricing required by OCTAP....").

19 These allegations continue to run afoul of the three-part *Covalt* test established by
20 the California Supreme Court to determine if a trial court lack lacks jurisdiction under
21 § 1759(a). Order at 9. To recap: The *Covalt* test asks "(1) whether the [CPUC] had the
22 authority to adopt a regulatory policy on the subject matter of the litigation; (2) whether
23 the [CPUC] had exercised that authority; and (3) whether action in the case before the
24 court would hinder or interfere with the [CPUC's] ongoing exercise of regulatory
25 authority." *San Diego Gas & Electric Co. v. Superior Court (Covalt)*, 13 Cal. 4th 893,
26 923-935. When all three prongs of the test are met, the court must dismiss for lack of
27 jurisdiction. *Covalt* at 923, 926, 935.

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1 As before, the first two *Covalt* prongs are clearly satisfied. Order at 9. Indeed,
 2 Plaintiff still alleges the CPUC had authority to regulate TNCs, and exercised that
 3 authority with respect to Uber. *Id.*; FAC ¶¶ 2, 15, 35, 31-42. The third prong is also
 4 satisfied. Although Plaintiff has removed a handful of allegations concerning "de facto
 5 taxis" from its FAC, the "gravamen" of Plaintiff's UCL and UPA claims remains Uber's
 6 alleged operation of "an unlicensed and unregulated taxi service." Order at 10-11.
 7 Consequently, as before, finding in Plaintiff's favor would *still* hinder or interfere with the
 8 CPUC's authority in violation of § 1759(a) by concluding that Uber is a taxi service and
 9 therefore subject to regulations other than those implemented by the CPUC. *Id.* at 11.
 10 This result would directly conflict with the CPUC's conclusion that Uber is *not* a taxi
 11 service and therefore *not* subject to local taxi regulations. CPUC Decision 13-09-045
 12 (Exh. J to RJD ISO Uber's 2016 Motion to Dismiss Plaintiff's Complaint [Dkt. No. 18], at
 13 23-25). As such, the Court should dismiss Plaintiff's UCL and UPA claims without leave
 14 to amend.

15 **B. This Case Is An Improper Collateral Attack On The CPUC's Decisions**

16 Plaintiff's UCL and UPA claims fail for a second, equally powerful, reason. Under
 17 Cal. Pub. Util. Code § 1756(a), "[a] final decision of the [CPUC] is subject to review in
 18 California only by a statutory writ of review in the Court of Appeal or Supreme Court."
 19 8 Witkin, *Summ. of Cal. Law, Constitutional Law*, § 1108, p. 739 (10th ed. 2005); *Anchor*
 20 *Lighting v. So. Cal. Edison Co.*, 142 Cal. App. 4th 541, 551-52 (2006) (dismissing UCL
 21 claim against utility as an improper collateral attack because under section 1756(a)
 22 plaintiff's sole means to challenge CPUC decision was petition for review to court of
 23 appeal or Supreme Court). Recognizing this rule, the Taxicab Paratransit Association of
 24 California ("TPAC") filed petitions for writ in the Court of Appeal and the California
 25 Supreme Court challenging the CPUC's determination that Uber and other companies are
 26 not taxis or subject to taxi regulation. Exhibits K, L to RJD ISO Uber's 2016 Motion to
 27 Dismiss Plaintiff's Complaint [Dkt. No. 18]). Both the Court of Appeal and the Supreme
 28 Court denied those petitions. Exhibits T, U to RJD ISO Uber's 2016 Motion to Dismiss

1 Plaintiff's Complaint [Dkt. No. 18]). The denial of TPAC's writ petitions was, under
 2 California law, the final word on the issue. Cal. Pub. Util. Code § 1756(a).

3 Plaintiff did not follow the lead of its trade association. It did not challenge the
 4 2013 Decision, the issuance of Rasier-CA's TNC permit, or Uber's settlements with the
 5 CPUC. Section 1756(a) precludes Plaintiff from attempting to attack these CPUC
 6 decisions here.

7 **C. Plaintiff Fails To Allege Facts Sufficient To State A Claim Under the
 8 UCL or the UPA**

9 Even if Plaintiff's claims could survive Uber's jurisdictional challenges, they still
 10 fail as a matter of law because Plaintiff still does not allege and cannot meet required
 11 elements of the UCL and UPA claims it attempts to plead.

12 **1. Plaintiff Has Failed To Allege A UCL Remedy**

13 This Court previously ruled that Plaintiff improperly sought non-restitutionary
 14 disgorgement. *Id.* at p. 18. Plaintiff has done nothing to upset the Court's dismissal of its
 15 UCL claim on this ground. To the contrary, the FAC *explicitly* alleges "damages," which
 16 are precluded by the UCL, and *still* fails to allege a plausible ownership interest in any
 17 money collected by Uber. Accordingly, Plaintiff's UCL claim again fails as a matter of
 18 law.¹

19 The UCL allows only injunctive relief and restitution; "damages cannot be
 20 recovered." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003).
 21 To claim restitution, Plaintiff must "have an ownership interest in the money it seeks to
 22 recover from" Uber. *Id.* at 1149. Such an interest might take the form of "'earned wages
 23 that are due and payable.'" *Id.*, citing *Cortez v. Purolator Air Filtration Products Co.*, 23
 24 Cal. 4th 163, 168 (2000). As a matter of law, however, a plaintiff does not have an
 25
 26

27 ¹ The Court also ruled that Plaintiff needed to allege its own detrimental reliance to state
 28 a claim under the FAL, or to state a UCL claim based on either fraudulent conduct or
 unlawful conduct predicated on the FAL. Order at 15. Plaintiff has now dropped its
 FAL claim, and there are no references in its cause of action under the UCL to
 fraudulent conduct or misrepresentations.

1 ownership interest in profits received by a perceived competitor from customers. *Id.* at
 2 1151, quoting *MAI Systems Corp. v. UIPS*, 856 F. Supp. 538, 542 (N.D. Cal. 1994)
 3 ("'[c]ompensation for a lost business opportunity is a measure of damages and not
 4 restitution to the alleged victims.'"). These sorts of interests are "contingent" and so
 5 constitute mere expectancies, not vested property interests. *Id.* at 1149.

6 Consequently, each court considering unfair competition claims by taxi companies
 7 and drivers against Uber has rejected those claims on the ground that the taxi company or
 8 driver could seek only damages, not restitution. *See, e.g., L.A. Taxi Coop., Inc. v. Uber*
 9 *Techs., Inc.*, 114 F. Supp. 3d 852, 859 (N.D. Cal. 2015) (Rejecting allegation of harm
 10 based on "customers [choice] to use Uber rather than taking a taxi" because "the
 11 complaint, as written, seeks only 'restitution and restitutionary disgorgement for all sums
 12 obtained in violation' of the California statutes; it does not allege an ownership interest in
 13 any of those profits or a 'confirmed' contractual relationship with any of Uber's customers"
 14 (citations omitted)); *Rosen II*, 164 F. Supp. 3d at 1178 (plaintiff had no claim for
 15 restitution where "Plaintiff has not alleged any vested interest in these profits, but only
 16 points to the possibility that Uber's customers would use his taxicab instead.").

17 Plaintiff initially sought to evade these results by alleging a "vested ownership
 18 interest" in certain Orange County taxi markets, and asserting that it was "damaged in the
 19 loss of money that it would have earned from fares, had [the Uber Defendants] not directly
 20 taken that money from passengers who would have taken a taxi ride with [Plaintiff]
 21 instead." Order at 17-18, citing Cmplt. ¶¶ 52, 56. The Court rejected those allegations,
 22 finding them analogous to the defective allegations in *L.A. Taxi*, 114 F. Supp. 3d at 859
 23 that "customers [chose] to use Uber rather than taking a taxi," and in *Rosen II*, 164 F.
 24 Supp. 3d at 1178 that "[p]laintiff ... only points to the possibility that Uber's customers
 25 would use his taxicab instead." Order at 17-18. Therefore, it concluded that as in those
 26 cases, Plaintiff failed to allege facts showing any ownership interest in taxi fares collected
 27 by Uber, and so could not show entitlement to restitution. *Id.* at 17.

28

1 Despite the Court's Order, Plaintiff's defective allegations remain in the FAC.
 2 Plaintiff still alleges "a vested property right to approximately twenty percent (20%) of the
 3 earnings from Anaheim taxicab operations." FAC ¶ 52. It also still alleges, albeit in
 4 slightly different words, that "every fare that an UBER de facto taxi picked up ... was a
 5 fare that UBER took directly from A TAXI's drivers...." *Id.* ¶ 59. *See also* ¶ 62 (Plaintiff
 6 was "deprived of its vested earnings" because Uber took "that money from passengers who
 7 would have taken a ride in an authentic A TAXI taxicab"); ¶ 63 (Uber took fares "that A
 8 TAXI would have received instead of UBER, but for UBER's acts of unfair competition.").
 9 This Court has already decided that Plaintiff's stolen taxi-fare allegations cannot form the
 10 basis of a claim to restitution under the UCL. Moreover, the FAC clarifies that Plaintiff
 11 did not even collect fares and so could not possibly have had a vested interest in them;
 12 instead, Plaintiff's revenue came in the form of lease payments from drivers. FAC ¶ 57.
 13 Thus, Plaintiff further undercuts its claim – already rejected once by the Court – that it
 14 owns a property interest in *fares* collected by Uber drivers.

15 Besides these clunky attempts to plead around the UCL's damages bar, the only
 16 difference between the FAC and the original complaint is Plaintiff's new suggestion that it
 17 lost money in the form of diminished *lease* revenue. FAC ¶ 59 ("UBER unfairly competed
 18 directly with A TAXI's drivers of authentic taxicabs for the same profits that A TAXI
 19 would otherwise have obtained (through its drivers' lease payments") ... all to A TAXI's
 20 direct damage as alleged herein"); *id.* ("each time UBER's wrongful acts alleged herein
 21 culminated in one or more of A TAXI's authentic taxicabs being taken out of the fleet
 22 since it was not or could not be leased to an A TAXI driver, represented UBER's direct
 23 taking of income of \$545 to A TAXI per week."). To be clear, Plaintiff does not allege
 24 that lease *rates* decreased. FAC ¶ 57. Rather, it alleges that from 2013 to early 2016, its
 25 drivers "began to discontinue leasing" due to perceived competition with Uber, and in
 26 some cases began driving for Uber instead. *Id.* As a result, it had far fewer leases by 2016
 27 than it had in 2013, and so was generating less revenue. *Id.*

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1 This distinction only weakens Plaintiff's case. Indeed, Plaintiff has no better basis
 2 to claim a "vested property interest" in lease agreements than in fares. Just as customers
 3 had every right to choose whether to take a taxi or an Uber, or some other form of
 4 transport, Plaintiff's former lessees had every right to choose whether or not to renew their
 5 leases, to pursue some other line of work, or to simply retire. This is precisely the sort of
 6 contingency noted in *Korea Supply*. As the Court made clear in that case, contingent
 7 interests are, by definition, not vested property interests.

8 Moreover, just as Plaintiff cannot allege that Uber drivers took specific, identified
 9 ride requests in which Plaintiff had a prior, established property interest, Plaintiff does not
 10 and cannot allege that Uber actually took over any particular leases. To the contrary, it is
 11 common knowledge that Uber's business model does not involve leases. Thus, even if
 12 Plaintiff had a vested interest in lease payments – which it did not – it cannot possibly
 13 allege that Uber *took* those lease payments, as it must to allege entitlement to restitution
 14 under the UCL. In short, whether Plaintiff asserts a vested interest in fares or in lease
 15 payments, or both, it improperly seeks to recover "compensation for a lost business
 16 opportunity," which "is a measure of damages and not restitution." *Korea Supply*, 29 Cal.
 17 4th at 1151.

18 Time and again courts – including this one – have rejected claims of
 19 misappropriation of market share on the grounds that they seek damages, not restitution.
 20 *Korea Supply Co.*, 29 Cal. 4th at 1151; *SkinMedica, Inc. v. Histogen Inc.*, 869 F. Supp. 2d
 21 1176, 1185-86 (S.D. Cal. 2012) (plaintiff's "lost property" caused by defendant unfairly
 22 "earn[ing] the sales that [plaintiff] would have made" did not constitute restitution);
 23 *Rosen II*, 164 F. Supp. 3d at 1178 ("the possibility that Uber's customers would use
 24 [Plaintiff's] taxicab instead" does not amount to an allegation of a vested interest in Uber's
 25 profits). As this Court explained in its Order, restitution is available only where the
 26 "money or property identified as belonging in good conscience to the plaintiff could
 27 clearly be traced to particular funds or property in the defendant's possession."). Order at
 28 17, citing *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 699 (2006).

1 Plaintiff wholly fails to explain how any money or property earned by Uber "belong[s]" to
 2 Plaintiff or can "clearly be traced" to any money or property in Uber's possession. To the
 3 contrary, Plaintiff continues to explicitly allege "damages." *See, e.g.*, FAC ¶¶ 56, 59.
 4 Plaintiff's "vested property interest" label thus still does not save its claim.

5 **2. Plaintiff Fails To State A Claim Under The Unfair Practices Act
 6 (UPA)**

7 (a) Plaintiff Fails to Show that its UPA Claim is Not Barred by
 8 § 17024's Exclusion of Claims Against Public Utilities Subject
 9 to CPUC Jurisdiction

10 Plaintiff, but not Uber, has taken the position that Uber is subject to CPUC
 11 jurisdiction – that is the basis for Plaintiff's claim for Declaratory Relief against the CPUC
 12 and its Commissioners. Given that allegation, Plaintiff's claim against Uber is precluded
 13 by the statutory exemption for public utilities contained in Cal. Bus. & Prof. Code
 14 § 17024. That section provides that the UPA does not apply "to any service, article or
 15 product for which rates are established under the jurisdiction of the Public Utilities
 16 Commission of this State and sold or furnished by any public utility corporation...." *Id.* at
 17 § 17024(1). Courts have broadly interpreted this exemption to apply whenever the CPUC
 18 has the *jurisdiction* to establish or set rates, even if it does not in fact do so. *Hladek v. City*
 19 *of Merced*, 69 Cal. App. 3d 585, 590 (1977) ("the pivotal issue is whether the Public
 20 Utilities Commission would have the jurisdiction to establish the rates for such service if it
 21 had been sold or furnished by a privately owned public utility."). Although *Hladek*
 22 analyzed the companion exclusion to the UPA, § 17024(2), which exempts publicly owned
 23 rather than privately owned public utilities, its conclusion is equally applicable here. *See,*
 24 *e.g.*, Cal. Antitrust and Unfair Competition Law, 2015 Revised Edition § 18.03[C] ("UPA
 25 expressly excludes ... services ... of privately owned public utilities the rates for which are
 26 within the jurisdiction of the [CPUC].")

27 Plaintiff alleges the CPUC's purpose is "to license, regulate, and enforce matters
 28 involving public utilities, including but not limited to, certain aspects of public

1 transportation." FAC ¶ 15. The FAC also alleges that the CPUC has assumed the
2 regulation of Rasier-CA, LLC and other TNCs.² *Id.* ¶ 2. Indeed, Plaintiff challenges the
3 CPUC's right to regulate Uber in this very lawsuit, thereby taking the position that the
4 CPUC has jurisdiction over Uber, and that Uber is a public utility. *See also* Cal. Const.,
5 Art. XII, § 3 ("[p]rivate corporations and persons that own, operate, control, or manage a
6 ... system for the transportation of people ... are public utilities subject to control by the
7 Legislature"); Cal. Const., Art. XII, § 6 (The CPUC "may fix rates ... for all public utilities
8 subject to its jurisdiction.").

9 Under its own allegations, Plaintiff cannot satisfy its burden to affirmatively allege
10 facts establishing that the statutory UPA exemption contained in Section 17024 does not
11 apply to Uber. *Hladek*, 69 Cal. App. 3d at 591 ("Such allegations are essential in order to
12 hold that the Public Utilities Commission would not have had *jurisdiction to set rates* for
13 respondent's transportation service...." (emphasis added). For this reason alone, Plaintiff's
14 UPA claim fails.

(b) Plaintiff Fails to State a UPA Claim

16 This Court previously dismissed Plaintiff's UPA cause of action because Plaintiff
17 failed to allege locality discrimination, or "facts regarding the Uber Defendants' prices, the
18 costs of their product, or their costs of doing business." Order at 18-19. Plaintiff *still* does
19 not even attempt to allege locality discrimination, so the Court need not dwell further on
20 that issue.

21 As to Plaintiff's supposed predatory pricing claim, the UPA provides that it is
22 unlawful "to sell any article or product at less than the cost thereof to such vendor, or to
23 give away any article or product, for the purpose of injuring competitors or destroying
24 competition." Cal. Bus. & Prof. Code § 17043. "[T]o satisfy the pleading requirements of
25 section 17043, the plaintiff must allege defendant's sales price, its cost in the product and

² Although Plaintiff's FAC and this motion refer to defendants, collectively, as "Uber," Rasier-CA, LLC is the only entity involved in this action that holds a TNC permit.

1 its cost of doing business. And the various costs **must** be stated in other than
 2 conclusionary terms." *G.H.I.I. v. MTS, Inc.*, 147 Cal. App. 3d 256, 275 (1983), emphasis
 3 added. Despite the Court's Order, Plaintiff still fails to meet these requirements. Although
 4 it now provides some allegations regarding Uber's pricing (FAC ¶ 67), the FAC remains
 5 devoid of facts showing the cost of Uber's products and the cost of doing business.
 6 *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc.*, 2013 U.S. Dist. LEXIS 89208, *46
 7 (N.D. Cal. June 25, 2013) (dismissing UPA claims omitting "basic elements" of relevant
 8 costs, but that "merely allege[] that [defendant's] capitated rate contracts [were] provided at
 9 'below cost.'").

10 The *only* concrete allegations Plaintiff makes regarding Uber's costs are
 11 concessions that Uber's "vehicle expenses [are] non-existent or negligible," and that Uber
 12 does not pay any "regular employment benefits" to drivers. FAC ¶ 69. These allegations
 13 cannot possibly support a UPA claim alleging that Uber priced its services below its costs.
 14 Plaintiff's real objection here appears to be, as before, that Defendants priced their services
 15 below *Plaintiff's* costs. *See, e.g.*, FAC ¶¶ 66-67 (Plaintiff and other taxi companies "have
 16 significant operating, licensing, regulatory, and commercial auto liability insurance
 17 premiums expenses" which Uber does not have). But the UPA requires Plaintiff to show
 18 that Uber prices its services at below its *own* costs, not below the price Plaintiff must
 19 charge due to requirements by the taxi industry.

20 The best Plaintiff can do to satisfy that requirement is to allege vaguely that "UBER
 21 has many other very large expenses." FAC ¶ 69. For instance, Plaintiff alleges that Uber
 22 employs roughly 7,000 people, and pays rent, insurance premiums, utility bills, and
 23 advertising and lobbying costs. *Id.* It adds, in conclusory fashion, that these costs "far
 24 exceeded its receipts from its *de facto* taxicab operations." *Id.* Plaintiff also quotes
 25 unsubstantiated media reports indicating that Uber pays money to experts to help minimize
 26 its tax bills, that Uber often settles lawsuits rather than litigating them through trial, and
 27 that Uber developed software so that it could offer its service more widely. *Id.*

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1 These grab-bag allegations do not begin to cure the defects identified by the Court.
 2 If this were enough to satisfy the pleading requirements under the UPA, then any
 3 perceived "competitor" could cobble inflammatory media reports into a complaint, allege
 4 "below-cost pricing," and on that basis alone abuse the UPA to conduct a fishing
 5 expedition into the operations and finances of their competitors. The problem would be
 6 particularly acute for innovative startup and technology companies, who routinely operate
 7 at a loss in their early years as they seek to expand their visibility and market share, and
 8 often, simply survive. In short, Plaintiff simply "makes no attempt to allege [Uber's] ...
 9 costs, or cost of doing business," and its UPA claim fails as a matter of law.

10 *Rheumatology*, 2013 U.S. Dist. LEXIS at * 46.

11 **IV. THE COURT SHOULD DENY LEAVE TO AMEND**

12 Courts routinely and properly deny leave to amend when the plaintiff cannot amend
 13 to cure the defects in his or her case. *See, e.g., Cooney v. Cal. P.U.C.*, 2014 U.S. Dist.
 14 LEXIS 165780 (N.D. Cal. 2014). As the *L.A. Taxi and Rosen II* results make clear, as well
 15 as Plaintiff's failed amendments, Plaintiff cannot amend to cure the jurisdictional defects
 16 defeating its UCL and UPA claims, nor can it plead around the remedy failings of its UCL
 17 claim or the flaws of its UPA claim. Under these circumstances, dismissal of those claims
 18 without leave to amend is entirely appropriate.

19 **V. CONCLUSION**

20 Plaintiff has done nothing of substance to address the basic defects this Court
 21 identified in its original Complaint. Plaintiff has included some new allegations, but those
 22 allegations do not change the basic facts: Plaintiff's "de facto taxi" claims invade the
 23 CPUC's exclusive jurisdiction; Plaintiff asks for damages, not restitution; and Plaintiff
 24 does not come close to alleging facts about Uber's pricing or costs sufficient to state a UPA

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1 claim. The Court should dismiss all claims against Uber in the FAC, save the Lanham Act
2 claim, this time without leave to amend.

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4 Dated: May 24, 2017

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By: /s/ Marshall C. Wallace

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